Supreme Court, U.S.
FILED
APR 13 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-914

IRVING BRAVER and MORTON LEHRER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' REPLY MEMORANDUM

JAY H. TOPKIS
Attorney for Petitioners
345 Park Avenue
New York, New York
10022

Of Counsel:

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1775 K Street, N. W.
Washington, D. C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-914

IRVING BRAVER and MORTON LEHRER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' REPLY MEMORANDUM

Petitioners respectfully submit these comments in reply to the Brief for the United States in Opposition.

I. The Solicitor General Effectively Concedes the Trial Court's Instructions in This Case Were Erroneous.

The Solicitor General does not argue that the trial court's bifurcated entrapment instruction was a correct statement of the law. Rather he states that use of this instruction "could not have prejudiced petitioner[s]."

(Opp. Br. 5). He further recognizes that the trial court's instruction was inconsistent with the law in other circuits. (*Id.*) Apparently the Solicitor General agrees with petitioners that the instruction was erroneous.

However, the Solicitor General argues that certiorari need not be granted since the conceded error did not prejudice the petitioners. Apparently he seeks to defend the decision below on a "harmless error" rationale. But, as pointed out in the petition, the Court of Appeals declined to base its decision on any "harmless error" doctrine. (Pet. 12, n. 6). That court recognized the impossibility of holding that the error in this jury instruction was harmless "beyond a reasonable doubt." *See Chapman* v. *California*, 386 U.S. 18, 24 (1967); *Harrington* v. *California*, 395 U.S. 250 (1969).

The Solicitor General contends that the evidence undisputedly showed that the Government had initiated the bribery transactions. He implies the jury must assuredly have found for petitioners on the initiation issue, regardless of the burden of proof erroneously placed upon them. As a factual matter the argument is simply incorrect. As petitioners pointed out in the Court of Appeals, a bifurcated entrapment instruction is confusing and misleading to the jury. The presence in a single instruction of two different burdens of proof on two different parties in connection with the same issue is quite likely to mislead and confuse the jury. There is no way of knowing whether the jury in fact found for the petitioners on initiation or whether it was misled into believing the petitioners had to prove their innocence on this issue in its entirety. The Solicitor General would have the Court look beyond the

face of the erroneous instruction and second-guess the jury's decision-making process. Such appellate salvaging of erroneous jury instructions is improper. However, even if the Court were to attempt reconstruction of the actual jury deliberations, it is impossible to conclude beyond a reasonable doubt that the error in the instructions "could not have prejudiced" the petitioners.

II. If Plenary Review Is Not Necessary To Resolve a Conflict in the Circuits, Summary Reversal Is Necessary To Do Justice to the Petitioners

The Solicitor General contends that the Court of Appeals' prospective ruling requiring a single element entrapment instruction eliminates the obvious conflict between the circuits and thus the necessity for review by this Court. Further, he contends that a "wholly prospective ruling would not be a deprivation of due process." (Opp. Br. 6, n. 4). As support he cites three cases[1] involving the retroactive effect of decisions of this Court. However, none of the cases cited were ones in which the defendants in the case announcing a new decision were deprived of the benefit of that decision. As noted by the Court of Appeals for the District of Columbia Circuit, this Court "has invariably adopted" the practice of applying a new rule in the case announcing that rule. *Gaither* v. *United States*, 413 F.2d 1061, 1085 (1969).[2]

---

[1] *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

[2] Indeed in the *Gaither* case itself the Court of Appeals initially declined to apply a new ruling in the case announcing that decision, but on reconsideration the court concluded that sound judicial practice required application of the new rule in that case.

Petitioners respectfully submit that the failure of the Court of Appeals to apply the new rule in this case is directly contrary to this Court's decision in *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967). (Pet. 13). In light of the Solicitor General's concession that the entrapment instruction was erroneous, summary reversal is in order.[3]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below reversed summarily, and the case remanded with instructions to grant a new trial.

Respectfully submitted,

JAY H. TOPKIS
Attorney for Petitioners
345 Park Avenue
New York, New York
10022

Of Counsel:

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1775 K Street, N. W.
Washington, D. C. 20006

March, 1972

[3] If the Court does not agree that *Stovall* justifies summary reversal, then certiorari should be granted to decide whether a Court of Appeals may properly decline to apply a new legal ruling in the case announcing that decision.